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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1938

No. [redacted] 48

CITY OF TALLAHASSEE, a Municipal Corporation
Organized Under the State Laws of Florida,

Petitioner,

vs.

OLAN MILLS INCORPORATED,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 920.

CITY OF TALLAHASSEE, a Municipal Corporation Organized Under the State Laws of Florida,

Petitioner,

vs.

OLAN MILLS INCORPORATED,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

The case below was tried on a stipulation of facts as referred to in the petition. The Respondent is Olan Mills Incorporated, a Tennessee corporation, and will be referred to as Olan Mills. Its method of doing business may be summarized as follows:

The Corporation has its principal office and its manufacturing plant in Chattanooga, Tennessee. At that plant photographic film is developed and processed, proofs are manufactured, and the finished photographs, which it sells to the public, are processed and finished.

As the first step in the sales plan, advance salesmen solicit orders for photographs to be manufactured, processed, and finished at the Chattanooga plant. They collect a deposit of fifty cents and arrange for the sitting or exposure.

As the second step, a travelling cameraman takes the picture as previously arranged and collects an additional payment of fifty cents.

As the third step, the exposed film is sent to Chattanooga where negatives are developed and temporary proofs are printed.

As the fourth step, the proofs are mailed to a traveling proof salesman, who presents the same to the customer in order that he may select from the proofs the picture he has purchased and order additional photographs if he so desires.

As the fifth step, the proofs selected are mailed back to Chattanooga where the photographs purchased are manufactured or processed.

Finally, the finished photographs are mailed to the customer in Florida.

Appellate Courts in the following cases, involving Olan Mills or its employees, have held that the method of doing business as described above is interstate in character; that the successive steps are integrated parts of the sales plan; and that states and municipalities cannot levy license or occupational taxes against Olan Mills or its employees.

Commonwealth of Virginia vs. Olan Mills Incorporated, et al., 86 S. E. (2) 27; 196 Va. 898 (Supreme Court of Appeals of Virginia, 1955);

Olan Mills vs. Panama City, 78 So. (2) 561 (Supreme Court of Florida, 1955);

Olan Mills vs. City of Nicholasville, 280 S. W. (2) 522 (Court of Appeals of Kentucky, 1955);

Olan Mills vs. City of Cape Girardeau, 272 S. W. (2) 244 (Supreme Court of Missouri, 1954);

Olan Mills vs. City of Elizabethton, 269 S. W. (2) 201 (Court of Appeals of Kentucky);

Olan Mills vs. City of Maysville, 272 S. W. (2) 460 (Court of Appeals of Kentucky);

Cordell (Olan Mills employee) *vs. Commonwealth of Kentucky*, 254 S. W. (2) 484 (Court of Appeals of Kentucky, 1954);

Bossert (Olan Mills employee) *vs. City of Okmulgee*, 260 P. (2) 429 (Criminal Court of Appeals of Oklahoma, 1953);

North Carolina vs. Jessie Mobley (Olan Mills employee) 66 S. E. (2) 12; 234 N. C. 55 (Supreme Court of North Carolina, 1951);

Nicholson, et al. (Olan Mills employees) *vs. Forrest City*, 216 Ark. 808, 228 S. W. (2) 53 (Supreme Court of Arkansas, 1950);

Olan Mills vs. City of Tallahassee, 43 So. (2) 521 (Supreme Court of Florida, 1950);

Graves (Olan Mills employee) *vs. City of Gainesville*, 78 Ga. App. 186, 51 S. E. (2) 58 (Court of Appeals of Georgia, 1948).

QUESTIONS PRESENTED.

The questions presented by the petition have been decided by applicable decisions of this Court.

Question One.

Both cameramen and solicitors perform acts that are integral parts of interstate commerce. Such local incidents cannot be taxed.

Nippert vs. City of Richmond, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586;

Memphis Steam Laundry & Cleaners, Inc. vs. Stone, 342 U. S. 389, 72 S. Ct. 424;

Michigan-Wisconsin Pipeline Company vs. Calvert, et al.;

Panhandle Eastern Pipeline Company vs. Calvert, et al., 347 U. S. 157, 74 S. Ct. 396;

Railway Express Agency, Inc. vs. Commonwealth of Virginia, 347 U. S. 359, 74 S. Ct. 558.

We quote from *Nippert vs. City of Richmond*, cited above:

"* * * If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involved 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local' and thus achieve its desired result.

It has not yet been decided that every State tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

Question Two.

A municipal occupational license tax although levied indiscriminately upon intrastate and interstate commerce is nevertheless invalid if it bears directly on interstate commerce.

Spector Motor Service, Inc. vs. O'Conner, 340 U. S. 602, 71 S. Ct. 508.

CASES CITED IN PETITION.

The cases cited in the petition are not applicable for the following reasons:

Oliver Iron Mining Company vs. Lord, 262 U. S. 172. This was a tax on the business of mining iron ore.

Utah Power and Light Company vs. Pfost, 286 U. S. 165. The Court held that the generation of electrical power was comparable to the manufacture of goods and subject to an occupational tax.

Coverdale vs. Arkansas-Louisiana Pipe Line Company, 303 U. S. 604. The production of mechanical power to increase the pressure on a pipe line was held to be subject to local taxation.

McGoldrick vs. Berwind-White Coal Mining Company, 309 U. S. 33. A tax in the nature of a sales or use tax can be levied on goods from out of state.

Caskey Baking Company vs. Virginia, 313 U. S. 117. A sale and delivery from stock brought into the state is not a sale in interstate commerce.

Interstate Oil Pipe Line Company vs. Stone, 337 U. S. 662. The Court approved the tax on the ground that the operation of the pipe line was wholly within the state. A strong dissent was made by four members of the Court and the decision was not followed in other pipeline cases heretofore cited in this brief.

Memphis Natural Gas Company vs. Stone, 335 U. S. 80. A franchise or excise tax on a portion of a pipe line lying in Mississippi was upheld. We submit that the dissenting opinion concurred in by four members of the Court expresses the better rule.

Braniff Airways vs. Nebraska State Board, 347 U. S. 590. This was an ad valorem tax on personal property.

Western Live Stock vs. Bureau of Revenue, 303 U. S. 250. The Court held that the business of preparing, printing and publishing a magazine constitutes doing business in the state.

ADVERSE DECISIONS.

The following cases were decided adversely to the contentions of Respondent as set out in this brief.

Lucas vs. City of Charlotte, 86 Fed. (2) 394.
Craig vs. Olan Mills, 203 Miss. 692, 33 So. (2) 801.
Graves vs. State of Alabama, 62 So. (2) 446.

The holdings of the Mississippi and Alabama Courts were based on the *Lucas* case which the other State Courts, in cases involving Olan Mills as cited, have declined to follow. The North Carolina Court points out that the District Court which had dismissed the injunction bill brought by Lucas to enjoin collection of a license fee had rested its decision "* * * in part, at least, on the ground that the plaintiffs had an adequate remedy at law, and also that the bill was defective for misjoinder of parties" * * *. "Consequently, in the light of these background facts, it may well be that the Circuit Court in reaching its decision gave only oblique consideration to the interstate commerce phase of the case. Also, in the cited *Lucas* case, it appears that the facts in respect to the details of the out-of-state processing and finishing work

may not have been developed before the Court so as to show, as in the instant case, the importance of these phases of the picturemaking business." *North Carolina vs. Mobley*, 66 S. E. (2) 12; 234 N. C. 55.

The Court of Appeals did not have the benefit of this Court's opinion in *Nippert vs. City of Richmond* when the *Lucas* case was decided and the determinative point in that case concerned the amount required for Federal Jurisdiction.

CONCLUSION.

For the reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT C. HUNT,

Counsel for Respondent.